Eight Mile Style, LLC et al v. Apple Computer, Incorporated Doc. 107

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC and
MARTIN AFFILIATED, LLC,

Plaintiffs

vs.

APPLE COMPUTER, INC. and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT,

Defendants.

_________________________________/

Case No. 2:07-CV-13164
Honorable Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

DEFENDANT AFTERMATH RECORDS AND APPLE INC.'S MOTION TO STRIKE DECLARATION OF PATRICK SULLIVAN AND PLAINTIFFS' "STATEMENT OF MATERIAL FACTS" AND CONDITIONAL MOTION TO STRIKE PLAINTIFFS' LATE-PRODUCED DOCUMENTS

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MOTION TO STRIKE DECLARATION OF PATRICK SULLIVAN AND PLAINTIFFS' "STATEMENT OF MATERIAL FACTS" AND CONDITIONAL MOTION TO STRIKE PLAINTIFFS' LATE-PRODUCED DOCUMENTS

Defendants Aftermath Records d/b/a Aftermath Entertainment ("Aftermath") and Apple Inc. ("Apple") (jointly "Defendants") respectfully move the Court for an Order striking:

[1] The Declaration of Patrick Sullivan in Opposition to Defendants' Motion for Summary Judgment (Docket No. 74-58), on the ground that the Declaration is attorney argument, and that Plaintiffs knowingly chose not to include within the 28-page limit on their Opposition Brief (Docket No. 65); and

[2] Plaintiffs' "Statement of Material Facts" (Docket No. 79), which is not authorized by the Federal or Local Rules and which likewise is in knowing violation of the Court's Order putting a 28-page limit on Plaintiffs' Opposition Brief (Docket No. 65).

Defendants also conditionally move for an Order that, in the event the Court grants Plaintiffs' pending Motion to Exclude "Late Produced" Documents (Docket No. 80), the Court also exclude the exhibits offered by Plaintiffs that were produced after the close of fact discovery and that Plaintiffs have relied on in their Opposition to Defendants' Motion for Summary Judgment.

Pursuant to Local Rule 7.1, Defendants sought but did not obtain Plaintiffs' consent to this Motion and Conditional Motion.

WHEREFORE, Defendants respectfully request that this Court grant their Motion and (if the above-stated condition is satisfied), their Conditional Motion.

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Case No. 2:07-CV-13164
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Magistrate Judge Donald A. Scheer

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE DECLARATION OF PATRICK SULLIVAN AND PLAINTIFFS' "STATEMENT OF MATERIAL FACTS" AND CONDITIONAL MOTION TO STRIKE PLAINTIFFS' LATE-PRODUCED DOCUMENTS

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CONCISE STATEMENT OF ISSUES PRESENTED

Whether the Court should strike a purported "Expert Declaration" that was admittedly drafted by Plaintiffs' counsel and that clearly makes attorney argument that Plaintiffs knowingly chose not to include within the 28-page briefing limit that the Court established for Plaintiffs' Opposition Brief?

Defendants' answer: Yes.

Whether the Court should strike Plaintiffs' "Statement of Material Facts," which was not authorized under either the Federal or Local Rules or any Order of this Court and that merely serves to expound upon points that Plaintiffs knowingly chose not to include within the page limits the Court established?

Defendants' answer: Yes.

Whether, if the Court grants Plaintiffs' pending Motion to Exclude "Late Produced" Documents (Docket No. 80), the Court also should exclude those documents that Plaintiffs produced after the close of fact discovery and have relied on in opposing Defendants' summary judgment motion?

Defendants' answer: Yes.

CONTROLLING AUTHORITIES

Federal Cases

Anderson v. United States,
39 Fed. Appx. 132 2002 WL 857742 at *2 (6th Cir. May 3, 2002)
Bridgeport Music, Inc. v. Dimension Films,
410 F.3d 792 (6th Cir. 2005)
In re Golden Books Family Ent., Inc.,
269 B.R. 300, 309 (Del. 2001)
S.S. v. Eastern Kentucky University,
532 F.3d 445 (6th Cir. 2008)
U.S. v. ASCAP,
485 F.Supp.2d 438 (S.D.N.Y. 2007)

Federal Statutes

17 U.S.C. § 505

Federal Rules

Civil L.R. 7.1(c)(3)(A)
Fed. R. Civ. P. 56(e)(1)
Rule 56(e)(2)

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This Motion is directed to three components of Plaintiffs' submissions in opposition to Defendants' Motion for Summary Judgment: (1) the "Declaration of Patrick Sullivan" filed in support of Plaintiffs' Opposition; (2) Plaintiffs' "Statement of Material Facts" filed in support of Plaintiffs' Opposition; and (3) documents that Plaintiffs produced after the fact-discovery cut-off and have submitted as evidence in support of their Opposition.

II. THE COURT SHOULD STRIKE THE "DECLARATION OF PATRICK SULLIVAN" AND PLAINTIFFS' "STATEMENT OF MATERIAL FACTS"

A. The Court's July 25, 2008 Order Provides That Plaintiffs' Opposition Brief Is "Not To Exceed 28 Pages"

The Court's July 25, 2008 Order Regarding Defendants' Motion for Summary Judgment provides that each of Defendants' Opening Brief and Plaintiffs' Opposition Brief is "not to exceed 28 pages." (Docket No. 65.) Pursuant to the Court's Order, Defendants' Opening Brief was exactly 28 pages. (Docket No. 66.)

B. The "Declaration Of Patrick Sullivan" And Plaintiffs' "Statement Of Material Facts" Are Full Of Attorney Arguments That Plaintiffs Knowingly Chose Not To Include Within The Page Limits The Court Established

Plaintiffs' Opposition Brief, filed on August 28, 2008, also was a document that was 28 pages in length. (Docket No. 74.) But that Opposition Brief was not the only memorandum of law that Plaintiffs filed. Plaintiffs also filed two additional documents – the "Declaration of Patrick Sullivan" (Docket No. 74-58) and their "Statement of Material Facts" (Docket No. 79) – that make lengthy legal arguments Plaintiffs chose not to include within their allotted 28 pages.

1. The Sullivan Declaration

Patrick Sullivan is the President of "Rights Flow," a company that performs licensing services for smaller and independent record labels.[1] Mr. Sullivan is not a lawyer, and he admitted at his deposition that he is not an expert on the law. LeMoine Decl. Ex. A at 129-31 (Sullivan Dep. Tr.). Nevertheless, Mr. Sullivan's declaration reads like an extended legal brief, advancing argument after argument in opposition to the legal and factual bases that Defendants cited in support of their summary judgment motion.

In particular, Mr. Sullivan's declaration responds to Defendants' summary judgment arguments based on the express licenses *other than* the Controlled Composition Clauses from the 1998 and 2003 Eminem artist recording agreements.[2] Defendants demonstrated in their opening brief that, in addition to the express licenses set forth in those Controlled Composition Clauses, Eminem and various of his co-authors had granted other express licenses that authorized the uses of the Compositions that Plaintiffs challenge in their Complaint. *See* Defendants Mot. at 6-8, 16-22 (Docket No. 66).

Plaintiffs' Opposition Brief contains a limited response to Defendants' arguments regarding these additional express licenses in Section IV, "The Third Party Documents Do Not

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[1] Mr. Sullivan admitted at his deposition that he is not "privy" to the practices of any of the four major music labels – Universal Music Group, SonyBMG, Warner Music Group and EMI – in obtaining licenses from music publishers relating to physical and online distribution of their works. LeMoine Decl. Ex. A at 114-28 (Sullivan Dep. Tr.).

[2] Plaintiffs also attached as Exhibit 1 to the Sullivan Declaration a copy of Mr. Sullivan's August 12, 2008 "expert report." Plaintiffs purport to cite to that expert report in support of various of their arguments in opposition to Defendants' summary judgment motion. *See, e.g.,* Plaintiffs' Opp. at 3 n.6 (citing Sullivan Expert Report ¶ 4); *id.* at 6 (citing Sullivan Expert Report ¶ 6). Mr. Sullivan's "expert report" is not evidence. It is an unsworn document that is not admissible to establish any dispute of material fact. *See* Fed. R. Civ. P. 56(e)(1) (opposing affidavit must "set out facts that would be admissible in evidence").

Defeat Plaintiffs' Claims." In that Section – which encompasses just over two and a half of Plaintiffs' 28 pages, *see* Opp. at 23-26 – Plaintiffs briefly state several truncated arguments on these issues. Plaintiffs purport to support those arguments with multiple citations to Mr. Sullivan's declaration. The declaration, in six pages of text, contains extended legal arguments in opposition to Defendants' reliance on the additional express licenses. To take just a small sampling of the assertions that are found in the Sullivan declaration:

- These supposed "licenses" must either: not be licenses at all; not be licenses to either one of the Defendants; or simply not be DPD [digital phonorecord delivery] licenses. Sullivan Decl. ¶ 3.

- Mechanical licenses and DPD licenses are non-exclusive licenses and, without the consent of the copyright owners, are not transferable or assignable inasmuch as such licenses convey only a grant of rights (a personal right) and not any ownership (property) rights in the copyright. Thus, if the purported licensee on the proffered "licenses" is any party other than Defendant Aftermath Entertainment doing business as Aftermath Records, a joint venture or Defendant Apple, Inc., the proffered "license" is expressly not a license to these Defendants. *Id.*

- In any instance in which Defendants proffer a controlled composition clause as the equivalent to a DPD license, that argument is invalid. Controlled compositions clauses are explicitly not allowed for [DPDs] and thus cannot operate as a DPD license. *Id.* ¶ 4.

- Further, an author or co-author of a musical composition may not license the composition where the author or co-author has transferred his copyright interest to a music publisher. *Id.*

- A "mechanical" license authorizes the mechanical reproduction and distribution of physical configurations while a DPD license authorizes the reproduction and delivery of an ephemeral copy of the sound recording by means of a digital transmission. DPDs are not covered in a standard mechanical license unless the license expressly provides that it does. *Id.* ¶ 5.

- These Notices [between Universal Music Group and Universal Music Publishing Group] cannot be considered licenses at all, as they lack nearly all of the material terms that should constitute a license. They lack

> provisions for accountings, audits, territory specification, and term specification, among others. Neither are these Notices in accordance with compulsory licensing procedures set forth in Section 115 of the Copyright Act. *Id*. ¶ 8.

In the course of expert discovery, it became clear why the declaration of the non-lawyer, Mr. Sullivan, read like a legal brief written by counsel for the Plaintiffs: because that is exactly what it is. Mr. Sullivan admitted that Plaintiffs' counsel *drafted the declaration*. LeMoine Decl. Ex. A at 248 (Sullivan Dep. Tr.). Emails between Mr. Sullivan and Plaintiffs' counsel show that Plaintiffs' counsel used the declaration to make attorney argument that Plaintiffs should have included, if at all, within the Opposition Brief. Plaintiffs' counsel decided what would be stated in the declaration and where (in their words, not Mr. Sullivan's) those words would "best fit." *See, e.g.*, *id*. Ex. B (Plaintiffs' Counsel to Sullivan, Aug. 27, 2008, 10:14 p.m.: "We will have to add" to the declaration "at an appropriate spot" the following statement (quoted in the bullet points above): "A 'mechanical' license authorizes the mechanical reproduction and distribution of physical configurations while a DPD license authorizes the reproduction and delivery of an ephemeral copy of the sound recording by means of a digital transmission."); *id*. (Plaintiffs' counsel to Sullivan, Aug. 27, 2008, 11:33 p.m.: "I inserted where I thought it best fit and another sentence to boot.").

Plaintiffs' counsel also padded the Sullivan declaration document with attorney argument in the form of two "charts" – attached as Exhibits 2 and 3 – that purport to demonstrate (respectively) the "expert's" critiques of certain third party licenses and controlled composition clauses. In reality, the charts simply reflect Plaintiffs' arguments in opposition to the evidence that Defendants submitted. The Sullivan declaration admits that Exhibit 3 was created by Plaintiffs' counsel. *See* Sullivan Decl. ¶ 4. The declaration contains no such disclaimer as to the chart attached as "Exhibit 2." Rather, Mr. Sullivan states under oath that the chart attached as Exhibit 2 summarizes "*my opinion* regarding the invalidity of those proffered documents as purported licenses for the Eminem Compositions under question here." *Id*. ¶ 3 (emphasis added). Documents obtained through expert discovery, however, reveal that this chart, too, was entirely the creation of Plaintiffs' counsel. In an August 20, 2008 email, one of the partners of Plaintiffs' lead counsel told Mr. Sullivan the following:

> Just as a heads up, as part of your declaration we will need you to address the various "licenses" that Aftermath attaches to their motion. I sent you all of the licenses previously; however, the analysis will be in a chart form attached to your declaration and will address the deficiencies like a) not a license at all; b) not a license to Aftermath (non-exclusive licenses are non-assignable, c) doesn't and can't license Eight Mile's share, 4) [sic] notice and confirmation by Universal pursuant to controlled comp (controlled comps inapplicable to DPDs) 5) [sic] purported licensor doesn't own the copyright, etc. The chart will help you go through everything and of course, if I say anything wrong, let's discuss. I'll get it to you as soon as I can. *It's drafted but needs some work.*

LeMoine Decl. Ex. C (emphasis added).

Mr. Sullivan admitted at deposition that Plaintiffs' counsel drafted Exhibit 2 in its entirety; he could not identify a single change he had asked Plaintiffs' counsel to make to that exhibit. LeMoine Decl. Ex. A at 253-54 (Sullivan Dep. Tr.). The chart makes various legal objections to documents relied on by Defendants, such as "unauthenticated" and "produced late." Mr. Sullivan admitted that he had no idea what was meant by these terms. *See id*. Ex. A at 473 ("I – I didn't write – I can't speculate on what it means); *id*. at 474 ("Q: Do you see where it says 'produced late'? A: Yes. Q: What does that mean? A: I can't – I can't authenticate that and I can't verify it. I didn't write it, so.").

For purposes of the instant motion, the significant fact about the charts is not that counsel drafted them, but that counsel purported to elaborate their arguments against the additional licenses in the text of the Sullivan declaration. A comparison of the excerpts from Mr. Sullivan's declaration quoted above (in the bullet points) and the email from Plaintiffs' counsel show that counsel included all of the legal arguments summarized in the email in the text of the declaration. Plaintiffs' counsel then incorporated these fully written out arguments with shorthand citations in the text of the Opposition Brief. In so doing, Plaintiffs did a knowing end-run around the 28-page briefing limit that the Court established for the summary judgment opposition.

2. Plaintiffs' "Statement Of Material Facts"

In addition to their Opposition Brief and the Sullivan declaration, Plaintiffs also submitted, among other documents, a 13-page "Statement of Material Facts." Neither the Federal Rules nor the Local Rules nor this Court's Order on Summary Judgment Briefing authorize the filing of such a "Statement of Material Facts." What is more, the document is hardly a statement of *facts*. This document, too, is packed with Plaintiffs' *legal arguments* in support of their Opposition Brief. For example, Plaintiffs state as "material facts" that:

- "An author who has assigned his or her administration rights in future compositions exclusively to a third party publisher has no right to license such future compositions. (Sullivan Decl. ¶ 4; Martin Decl. ¶ 15)" "Material Fact 3."

- "Non-exclusive licenses are not assignable absent agreement of all co-owners. *In re Golden Books Family Ent., Inc.*, 269 B.R. 300, 309 (Del. 2001)." "Material Fact 4."

- "Eminem does not control any of the Eminem Compositions, and has no right to license any of the Eminem Compositions. (Martin Decl. ¶ 2.)" "Material Fact 6."

- "The 'Mechanical Royalties' paragraph of the Agreements is not itself a 'mechanical license' of controlled compositions, instead simply setting a reduced mechanical royalty rate at which controlled compositions will be licensed in the future to Aftermath and its distributors/licensees. In some recording contracts, including recording agreements drafted by Aftermath and other Universal affiliates, discussed below, similar paragraphs sometimes state that controlled compositions 'are hereby licensed' to the label. (Sullivan Decl., Ex. 1 ¶ X, XII)." "Material Fact 12."

- "The Mechanical Royalties paragraph does not contain the terms of a self-executing license such as effective date, the actual mechanical rate, duration, identification of label's product by record number and configuration, accounting periods or payment due dates. (*See* Ex. 6, Martin Dep. 320:15-17, 23-322:11; Sullivan Decl. Ex. 1, ¶¶ VI, XII)." "Material Fact 15."

- "Delivery of a music file to a purchaser via a download constitutes a mechanical reproduction of the copyrighted work in the form of a DPD. *U.S. v. ASCAP*, 485 F.Supp.2d 438, 443-44, 446-47 (S.D.N.Y. 2007)." "Material Fact 19."

- "Thus, plaintiffs have the right to enter into a DPD license directly with Apple. (Sullivan Decl. Ex. 1, ¶ IX.)" "Material Fact 22."

- "In amending Section 115, the Senate intended that controlled composition clauses would not govern DPDs. (Ex. 22, Pub. L. No. 104-39, 109 Stat. 336, S. Rpt. 104-208 at 41.)" "Material Fact 27."

Although Defendants were not able to take discovery into the circumstances surrounding the preparation of Plaintiffs' "Statement of Material Facts," it is obvious from the foregoing examples and the rest of that document that Plaintiffs utilized it to make attorney argument in opposition to Defendants' Summary Judgment Motion. This is in no way authorized by any Rule (Federal or Local) or Order of the Court. Plaintiffs purported to justify their "Statement of Material Facts" as submitted "[p]ursuant to Rule 56(e)(2) of the Federal Rules of Civil Procedure." Statement at p.1. Nothing in Rule 56(e)(2) authorizes the filing of such a separate statement. That Rule simply provides that "[w]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." While some Judicial Districts and individual District Judges have local rules or individual orders that authorize or require the filing of separate statements by parties moving for or opposing summary judgment, the Local Rules of this District contain no such provision and none of this Court's Orders authorize the filing of such separate statements. Accordingly, Plaintiffs' response to Defendants' Revised Motion for Summary Judgment was required to be set out within the confines of the Opposition Brief (within the page limits set by the Court) and supported by competent, admissible affidavits or declarations setting forth facts, not attorney argument.

C. The Court Should Strike The Sullivan Declaration And The "Statement Of Material Facts" Because It Is Apparent That Plaintiffs Knowingly Violated The Court's Order On Page Limits For The Summary Judgment Opposition Brief

The Court has express authorization under Federal Rule of Civil Procedure 83(b) to "regulate practice in any manner consistent with" the Federal or Local Rules. The case law of this Circuit likewise makes it clear that this Court has the authority to establish the limits on allowed briefing on a motion. *See, e.g., S.S. v. Eastern Kentucky University*, 532 F.3d 445, 451-52 (6th Cir. 2008) (decisions on page limits and whether to extend committed to district court's discretion, including needs of the case and "considerations of fairness").

The Local Rules establish the general rule that a brief in response to a motion may not exceed 20 pages. *See* Civil L.R. 7.1(c)(3)(A). The Court's July 25, 2008 Order extended the length of allowed opening and response briefs on the summary judgment motion, providing that both briefs were "not to exceed 28 pages." (Docket No. 65.) The Court has the power to strike a brief filed in excess of the allowed page limits when, following the filing party's opportunity to respond, it is determined that the party knowingly attempted to evade the page limits on briefing. *See Anderson v. United States*, 39 Fed. Appx. 132, 135, 2002 WL 857742 at *2 (6th Cir. May 3, 2002).[3] A party's evasion of a Court's order regarding page limits may result not only in a motion to strike, but may be considered in awarding fees and costs in a case. *See, e.g.*, *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 809 (6th Cir. 2005) (affirming award of attorneys' fees under Copyright Act, 17 U.S.C. § 505, where plaintiffs (represented by plaintiffs' counsel in this case), "repeatedly taxed the patience of the Court" and used tactics that "contributed to the multiplication of fees by all parties," including, *inter alia*, by "narrowing the margins on their memoranda to circumvent page limits").

The evidence summarized in the preceding sections demonstrates that Plaintiffs knowingly used the Sullivan declaration and Plaintiffs' "Statement of Material Facts" to make attorney arguments that Plaintiffs were required to state, if at all, within the limits of the 28 pages that the Court allotted to Plaintiffs. As revealed by the email correspondence and drafting history of the Sullivan declaration, it is clear that Plaintiffs knew they were using the Sullivan declaration to make attorney argument. *See, e.g.*, LeMoine Decl. Ex. C ("Just as a heads up, as part of your declaration we will need you to address the various 'licenses' that Aftermath attaches to their motion. ... The chart will help you go through everything and of course, if I say anything wrong, let's discuss. I'll get it to you as soon as I can. It's drafted but needs some work."). Defendants do not have comparable access to the history behind the drafting of the "Statement of Material Facts," but the extensive legal arguments compiled in that document

[3] *Anderson's* separate holding that "striking *a pleading* should be used sparingly by the courts[,]" 39 Fed Appx. at 135, 2002 WL 857742 at *2 (emphasis added), has no relevance to this motion. Neither the Sullivan declaration nor Plaintiffs' "Statement of Material Facts" is a pleading. *See* Fed. R. Civ. P. 7(a).

make it clear that Plaintiffs used that document as a separate platform for making their arguments.

The result of these tactics is that Plaintiffs received a combined total of 19 pages of additional briefing in opposition to Defendants' motion. These tactics are manifestly unfair to Defendants, who stated their opening arguments within the 28 pages of briefing that the Court allotted to them. Defendants did not submit an "expert declaration" elaborating on their arguments in support of their motion. Nor did Defendants submit a separate statement of undisputed facts, for the simple reason that nothing in the Federal or Local Rules of the Court's Order on Summary Judgment Briefing authorized them to do so. The Court can and should strike this additional argument as being in violation of the Court's Order setting page limits for the summary judgment briefing.

III. IF THE COURT GRANTS PLAINTIFFS' MOTION TO STRIKE "LATE-PRODUCED" DOCUMENTS, THEN DOCUMENTS THAT PLAINTIFFS PRODUCED AFTER THE DISCOVERY CUT-OFF AND THAT PLAINTIFFS RELY ON IN OPPOSING SUMMARY JUDGMENT MUST BE EXCLUDED

In addition to the motion to strike the foregoing materials, Defendants also conditionally move for an Order striking from the summary judgment record those documents that Plaintiffs produced after the discovery cut-off and have submitted in support of their opposition. This motion is conditional in that Defendants make it only if the Court grants Plaintiffs' pending Motion to Exclude documents that Plaintiffs claim were "late produced." Defendants have set forth separately why they believe Plaintiffs' Motion to Exclude should be denied. *See* Opp. to Mot. to Exclude (Docket No. 86.) If the Court grants Plaintiffs' motion, however, then the same rule must be applied to those documents that Plaintiffs produced after the discovery cut-off and submitted in support of their Opposition.

Plaintiffs produced almost 25% of their total production in this case after the June 2, 2008 discovery cut-off. LeMoine Decl. ¶ 7. This post-cut-off production includes numerous documents that Plaintiffs submitted in support of their Opposition, which Plaintiffs did not produce until August 28, 2008, when these documents were attached to Plaintiffs' Opposition filing. *Id*. Plaintiffs continued to produce documents into September, and most recently produced a document (long requested by Defendants) on October 6, 2008. *Id*.

Plaintiffs have no credible justification for their delay in producing these documents. Unlike the documents that are the subject of Plaintiffs' motion, Plaintiffs did not produce these documents in response to late-served discovery requests or a Court Order on a motion to compel. The documents that Plaintiffs produced late relate directly to a core element of their case – Plaintiffs' purported claim of ownership of the Compositions at issue – and were sought in discovery requests served many months ago. Plaintiffs agreed to respond to those requests, but never provided these documents until far too late for Defendants to rely on them in their motion for summary judgment in this matter. *See id*. Exs. D and E (Plaintiffs' Responses to First Set of Interrogatories, Interrogatories Nos. 1, 2 and 5 and attached Schedule 1) and Exs. F and G (Plaintiffs' Responses to First Set of Requests for Production of Documents, Request Nos. 8, 18 and 19).[4]

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[4] Documents relating to Plaintiffs' claim of ownership are also encompassed within Defendants' First Set of Requests for Production of Documents, Nos. 1, 6, 13, and 14, all of which Plaintiffs agreed to provide documents in response to. LeMoine Decl. Exs. F & G. Information and documents relating to co-publishers or administrators were also specifically encompassed within Defendants' Second Set of Requests for Production at No. 22 and Interrogatories Nos. 23 and 24. LeMoine Decl. Exs. H-K. Plaintiffs also agreed to provide information responsive to these requests, and have never explained why they utterly failed to do so until months after the close of discovery. *Id*.

As Defendants have argued, Plaintiffs' Motion to Exclude should be denied. If, however, that motion is granted, there is no principled basis to allow Plaintiffs to rely on documents that they unjustifiably produced well after the close of fact discovery.

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the all counsel.

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